STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
V	No. 251513 St. Clair Circuit Court
RODNEY CORNELIUS MASON, Defendant-Appellant.	LC No. 03-000950-FH

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of a controlled substance (cocaine) less than 25 grams, MCL 333.7403(2)(a)(*v*), and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced as a fourth habitual offender, MCL 769.12, to 18 months to 15 years' imprisonment for each offense. The judgment of sentence indicates that the prison terms are to be served consecutive to each other and consecutive to defendant's sentence in docket number 98-9663-FH.[1] Defendant appeals as of right, arguing that there was insufficient evidence to support the convictions and that both verdicts were against the great weight of the evidence. Specifically, defendant contends that the prosecution failed to establish that defendant "possessed" the drugs found in his apartment for purposes of the cocaine possession charge and that the prosecution failed to show that any persons frequented defendant's residence to use drugs or show that the drugs were sufficient in quantity to support a conviction for maintaining a

[1] The transcript of the sentencing hearing indicates that the trial court simply stated that the "sentence shall run consecutive to case number 98-933-FH." There is no mention that the sentences, on the convictions at issue here, were to run consecutive to each other, and the case number given by the court for a 1998 prosecution is inconsistent with the case number provided in the judgment of sentence. A review of the record reflects that, with respect to the year 1998 only, defendant had but one conviction arising out of an arrest that year. He was convicted in November 1998 of delivery of a controlled substance (cocaine) and sentenced to 1 to 20 years' imprisonment. The presentence investigation report states that the lower court case number regarding this conviction is 98-9663-FH. We presume that this single 1998 conviction and sentence is the case intended by the court to be considered in regard to consecutive sentencing. Defendant was on parole for the 1998 drug conviction at the time the present offenses were committed on September 26, 2002.

drug house. Defendant additionally raises issues of ineffective assistance of trial and appellate counsel, with the appellate counsel arguments being contained in defendant's standard 11 brief. Finally, defendant asserts multiple errors with regard to sentencing. We affirm on all the issues presented except as to a single sentencing/ineffective assistance issue that requires remand for possible correction of the judgment of sentence.

I. FACTS

This case arose out of the discovery of crack cocaine in defendant's apartment by police officers who were executing a search warrant. The warrant was executed on September 26, 2002, at 3:00 a.m.

Deputy Michael Bailey, an officer with the St. Clair County Sheriff's Department and assigned to the Drug Task Force, testified that he was involved in the execution of the search warrant, which pertained to an apartment-residence on White St. in Port Huron. According to Bailey, two individuals, including defendant, were in the process of exiting the premises when officers executed the warrant. The other individual with defendant was Solomon Brown. Both Brown and defendant were taken into custody. Bailey testified that 7 to 9 other officers also participated in the search.

Deputy Steve Amey, an officer with the St. Clair County Sheriff's Department and assigned to the Drug Task Force as an evidence technician, provided the bulk of the testimony against defendant. Amey testified that, during execution of the search warrant, police found suspected cocaine "in a hot plate type box" in the kitchen and a rock of suspected crack cocaine under a burner on the kitchen stove. The hot-plate box held one large external baggy with two smaller knotted baggies located therein. The two smaller baggies contained suspected cocaine. Amey testified that one of the baggies weighed .2 grams. The two baggies contained roughly the same amount of substances according to Amey. He opined that the substance found in both baggies was cocaine.

Police also found burnt pieces or filaments of Chore Boy, a brand name copper scouring or cleaning pad, on two of the stove's burners. The burners on the gas stove could be completely lifted up to allow cleaning. As mentioned above, a rock of suspected cocaine was found under one of the burners. Regarding the relevancy of the burnt pieces of Chore Boy on the stove, Amey testified:

> *Q.* And what's Chore Boy?
>
> *A.* Chore Boy is the copper scouring pad that[] typically is a bright copper color, and what that is used for in crack cocaine is that when somebody smokes cocaine they take the Chore Boy from that ball of copper mesh that's there, take the filaments from it, wrap it around, place it in the glass tube, and then when they smoke the crack cocaine it acts as a filter and prevents the person from actually sucking up the crack rock, too.
>
> *Q.* Does the fact that these items are found at the stove or on the stove suggest anything to you?

A. The burnt copper Chore Boy on top of the burners suggests that there was some crack cocaine smoked there.

Q. Is that unusual that someone who might be consuming cocaine would do that over a burner?

A. No, because typically you need a high heat to smoke crack cocaine and a burner, like a stove, allows you access to leave the stove on without having a lighter where it's going to get hot. Whereas a stove is something you can turn on and leave on for a long time and it isn't going to affect the process.

Amey indicated that ordinary steel wool could not be used because it would actually ignite. He also stated that it was filaments of Chore Boy that were found and not chunks or wads of the product. Amey further testified that, in the search of the kitchen, police found a cell phone with a charger, two Radio Shack receipts in defendant's name totaling $95, which Amey believed were for the purchase of prepaid phone minutes, and a Sprint phone card. Police additionally located a wallet-type purse containing defendant's identification on the top of a cupboard in the kitchen. The purse contained defendant's personal papers, a library card, bills, and a black notebook that listed names and phone numbers, none of which names jumped out at Amey as being individuals involved in drug activity. The purse did not contain narcotics, cash, or baggies, and it was not tested for drug residue. A letter was found on the cupboard that was addressed to defendant at a Port Huron post office box. Also found on the top of this kitchen cupboard was a box of Efferdent tablets that might have been used as a "cutter" to mix in with the cocaine.[2] Next to the box of Efferdent, the purse, and the cell phone was a baggy with a corner cut out. The significance of such a baggy was explained by Amey:

> It's a common packaging agent. It's used, if a corner of a baggy's cut off on an angle, it's typically something that we find crack cocaine in or we found powder cocaine in. We also can find marijuana. Usually what they'll do, they'll take the corner bag, put their item in there, twist it, tie it in a knot, cut the top of it off and that's on there, and that leaves the corner of the baggy gone.

On cross-examination, Amey testified that anyone could purchase Chore Boy in a store and that the product can properly be used for cleaning cookware, boiler pans, barbecue grills, stove burners, oven racks, and other surfaces and items. The police did not find a box of Chore Boy in the apartment. Amey also acknowledged that only one of the baggies of suspected cocaine found in the hot-plate box was tested in a lab for the presence of controlled substances, which test was positive for cocaine, and not the other baggy found in the box, nor the cocaine under the burner.

Amey further testified that a vehicle was found at the residence, and he believed it was registered to defendant but could not state so with certainty. The police also discovered $78 in

[2] Amey did not know whether defendant had his own teeth.

cash in the pocket of a jacket hanging in a closet and a bag of personal belongings, including clothes. Amey testified:

Q. Was there an ID contained in these belongings of any type?

A. Not to my knowledge.

Q. Nothing? Nothing describing another person Tim Williams, perhaps?

A. I believe there was a piece of mail there, yes.

Q. For a Tim Williams?

A. Yes.[3]

Cheryl Torigan, a forensic scientist in the narcotics unit of the Michigan State Police Lab and an expert in the analysis of controlled substances, testified that she tested the contents of one of the baggies found in the hot-plate box and detected the presence of cocaine. There was a high probability that the cocaine was at least 80 percent pure. Before testing, the cocaine weighed .19 grams. Torigan acknowledged that the rock of crack cocaine that she tested was very small. She did not analyze any other substances discovered at the crime scene; she just randomly chose the baggy whose contents were actually analyzed. Torigan explained that not all the substances from the scene were tested because weight limit was not an issue where defendant was charged with possession of less than 25 grams of cocaine. Although she believed that the substances that were not tested looked similar to the crack cocaine that was identified, Torigan was not prepared to say or offer an opinion that the other substances indeed contained the presence of cocaine.

Detective Sergeant Steve Nowicki of the Michigan State Police, who was qualified as an expert in identifying fingerprints, testified that he checked for fingerprints on multiple plastic baggies but could find no prints. Nowicki stated that fingerprints are not left behind on everything we touch, and he opined that lifting usable prints from sandwich bags is extremely difficult. Nowicki testified that on the 500 to 1000 occasions that he has checked for fingerprints on baggies, he has only been able to make a fingerprint connection in less than 1 percent of his efforts.

The prosecution rested, and defendant moved for a directed verdict that was denied in cursory fashion. The defense rested without presenting any witnesses. The prosecution was permitted to call a rebuttal witness because of defense counsel's reference to a roommate in his opening statement and officer Amey's testimony that a letter was found in the apartment addressed to Tim Williams. The rebuttal witness, James Gilchrist, was defendant's parole officer. Without identifying his employment and specific connection with defendant, Gilchrist simply testified, in short and vague fashion, that defendant was required to report if he had a roommate residing with him and that defendant never reported having a roommate. Before

[3] Defendant argues on appeal that Tim Williams was a roommate. In his opening statement at trial, defense counsel stated that defendant had a roommate by the name of Tim Williams.

Gilchrist testified, he was instructed by the prosecutor and the court not to identify himself as defendant's parole officer and not to make any reference to being a parole officer so as to protect defendant's right to a fair trial.

The jury deliberated and found defendant guilty of possession of cocaine in an amount less than 25 grams and guilty of maintaining a drug house. Additional facts will be discussed below where relevant to the appellate issues presented.

II. APPELLATE ISSUES and ANALYSIS

A. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support a conviction on both the drug possession charge and the charge of maintaining a drug house. With respect to the cocaine possession offense, defendant contends that the prosecutor failed to establish that defendant possessed the cocaine. Defendant asserts that, although he resided at the apartment, was walking out of the apartment when the raid occurred, and there were bills in his name for that location, the cocaine could just as easily have belonged to Solomon Brown, Tim Williams, or someone else. Defendant points out that the cocaine in the kitchen was accessible by anyone in the apartment and that there were no drugs found on defendant's person or in the wallet-type purse. Moreover, defendant argues that his fingerprints were not found on any incriminating evidence. He maintains that there was no evidence to show that he ever knew cocaine was present in his home.

With respect to the offense of maintaining a drug house, defendant asserts that there was no evidence that people frequented or entered the apartment to use or purchase drugs, that he and Brown had no drugs on them when they were taken into custody, and that the amount of cocaine was too minimal to support a conviction.[4]

A challenge to the sufficiency of the evidence is reviewed de novo on appeal. See *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757;

[4] Defendant argues that he is entitled to a new trial. A new trial, however, is not the appropriate remedy for a due process violation predicated on a lack of sufficient evidence to support the conviction, rather a verdict of acquittal must be entered. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). The granting of a new trial is the proper remedy where the verdict reached by the jury is against the great weight of the evidence. *Id.* at 634-635; see also MCL 770.1 and MCR 6.431(B).

597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

We first address the cocaine possession conviction. To establish the elements of unlawful possession of less than 25 grams of cocaine, a prosecutor is required to prove that (1) the defendant possessed a controlled substance, (2) the substance that the defendant possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed less than 25 grams. MCL 333.7403(2)(a)(*v*); CJI2d 12.5; see also *Wolfe, supra* at 516-517. Regarding the element of possession, the *Wolfe* Court stated:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.
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> In this case, there was no direct evidence that defendant Wolfe actually possessed the cocaine. Rather, the evidence produced at trial showed that he constructively possessed the cocaine, i.e., that he "had the right to exercise control of the cocaine and knew that it was present." . . . It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. . . .
>
> [C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. [*Wolfe, supra* at 519-521 (citations omitted); see also CJI2d 12.7.]

Possession signifies dominion or right of control over a controlled substance with knowledge of its presence and character, and possession may be proved by circumstantial evidence and reasonable inferences drawn from this evidence. *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). In *Nunez, id.* at 616, this Court found sufficient evidence to establish possession based, in part, on evidence showing that the defendant resided in or habitually used an apartment where cocaine was found, that several utility bills were addressed to the defendant at the apartment, that the defendant had keys to the apartment, and that the defendant's car was seen parked at the apartment.

We find the evidence sufficient to support the conclusion that defendant knowingly possessed the cocaine found in the kitchen of his residence. While there was a fleeting reference by officer Amey that the police found a letter addressed to Tim Williams inside the apartment, and Solomon Brown was leaving the apartment with defendant when the raid took place, there was no evidence that anyone beside defendant actually lived in the apartment. Furthermore, the apartment was very small according to witnesses, and the cocaine was found in defendant's kitchen near various personal items belonging to defendant. The drugs were found just after defendant had been in the apartment. Assuming that Williams was a roommate and that Brown could access the apartment, the drugs, as noted above, were next to defendant's belongings, and, regardless, the jury could have found defendant guilty on the basis of joint possession as the cocaine was located in the kitchen. A rational trier of fact could find a sufficient nexus between defendant and the contraband. The circumstantial evidence, and reasonable inferences arising

from the evidence, pointed to defendant being in constructive possession of the cocaine. There was sufficient evidence, when viewed in a light most favorable to the prosecution, for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt.

In regard to the conviction for maintaining a drug house, MCL 333.7405(1)(d) provides that a person "[s]hall not knowingly keep or maintain a . . . dwelling, . . . or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, *or* that is used for keeping or selling controlled substances in violation of this article." (Emphasis added). To "keep or maintain" a drug house "it is not necessary to own or reside at one, but simply to exercise authority or control over the property for purposes of making it available for keeping or selling proscribed drugs and to do so continuously for an appreciable period." *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999).

Defendant contends that there was no evidence that people frequented or entered the apartment to use or purchase drugs, that he and Brown had no drugs on them when they were taken into custody, and that the amount of cocaine was too minimal to support a conviction.

MCL 333.7405(1)(d) permits a conviction not only where the home is frequented by persons for the purpose of using controlled substances, but also where the home is used "for keeping" proscribed drugs. The cocaine was kept in the home, and the burned chars of Chore Boy, the way the two bags of cocaine were packaged, the cut baggy corners, the presence of a product possibly used to mix in with the cocaine, and the totality of the circumstances, provided circumstantial evidence that cocaine had been used in the home and that the home was part of a drug operation.

The fact that defendant and Brown had no drugs on their persons does not detract from a finding that defendant was maintaining a drug house. As to defendant's argument that the amount of cocaine was too minimal to support a conviction, MCL 333.7405(1)(d) contains no requirement that a certain amount or weight of drugs be found in the home to establish a conviction. While we acknowledge that the prosecution did not have an especially strong case, there was sufficient evidence, when viewed in a light most favorable to the prosecution, for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt.

B. The Great Weight of the Evidence

The facts and arguments relied on by defendant relative to his claim that the guilty verdicts were against the great weight of the evidence mimic those concerning the sufficiency argument. In *People v Lemmon*, 456 Mich 625, 633-636; 576 NW2d 129 (1998), our Supreme Court discussed and distinguished sufficiency claims and those predicated on the argument that the verdict was against the great weight of the evidence. In regard to a claim that the verdict was against the great weight of the evidence, a new trial may be granted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 627. In general, testimony that conflicts or questions with respect to the credibility of witnesses are not sufficient grounds for granting a new trial. *Id.* at 643.

On the basis of the facts and reasonable inferences relied on by us in addressing the sufficiency claim, we conclude that the evidence did not preponderate heavily against the verdicts so that it would be a miscarriage of justice to allow the verdicts to stand.

C. Ineffective Assistance of Trial and Appellate Counsel

Defendant presents numerous alleged instances of ineffective assistance of counsel. First, defendant asserts that trial counsel failed to subpoena for trial defendant's landlord, James Biga, who allegedly would have testified that he allowed Tim Williams to reside in the apartment as a temporary guest and that Williams had been there for over a month. Next, defendant maintains that trial counsel failed to file a motion to exclude the introduction of prior bad acts, which, if filed, would have precluded the prosecutor from using evidence of past crimes, and which then would have permitted defendant to take the stand on his own behalf. Next, defendant argues that trial counsel failed to file an interlocutory appeal, challenging the trial court's denial of defendant's motion to dismiss for violation of the 180-day rule. Finally, defendant contends that trial counsel failed to object to the enhancement of defendant's sentences, where they were improperly supplemented under the habitual-offender statute and the controlled substances act, MCL 333.7101 *et seq*.

In defendant's standard 11 brief, he additionally challenges appellate counsel's failure to timely file the motion for new trial, *Ginther*[5] hearing, and, in the alternative, resentencing.[6] Further, defendant argues that appellate counsel incorrectly noted, in the appellate brief counsel prepared, that defendant was sentenced to concurrent terms for the drug house and drug possession convictions, where defendant was actually sentenced to consecutive terms on those convictions. Defendant additionally contends that appellate counsel failed to follow defendant's directive not to file a motion to remand with this Court without defendant's prior approval and

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[6] Trial counsel filed a "motion for new trial, or *Ginther* hearing, and or for resentencing" on April 26, 2004. The claim of appeal was filed on October 15, 2003. The prosecutor submitted an answer to the motion, arguing that the time to file defendant's motion had expired. MCR 6.431(A)(2) permits a defendant to file a motion for new trial after a claim of appeal has been filed but only in accordance with MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1). MCR 7.208(B)(1) provides, "No later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing." Under MCR 7.212(A)(1)(a)(iii), the time for filing an appellant brief must be within "56 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later[.]" The transcript was filed on January 8, 2004. Therefore, defendant's motion was untimely. Defendant's motion for remand, which was filed with this Court on April 23, 2004, was denied. The lower court file includes an order denying defendant's motion that was entered on May 18, 2004. The order simply indicates that the court, having heard the arguments of the parties, denied the motion for reasons stated on the record. The record does not include any transcript of the hearing on the motion, if indeed one was held. It is therefore unclear as to the specific grounds relied on by the trial court in denying the motion.

failed to expand the written argument in its entirety, causing defendant to attempt to prepare a written argument in pro per by way of a supplemental brief.[7] Defendant also complains that appellate counsel failed to forward copies of the transcript to defendant, which hindered his ability to prepare a brief.

Whether a person has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles that guide the analysis of a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that trial counsel failed to subpoena Biga, who allegedly would have testified that he allowed Williams to reside in the apartment as a temporary guest and that Williams had been there for over a month. Defendant maintains that the prejudice he suffered by counsel's failure to call Biga was compounded by the testimony of parole agent Gilchrist. While we agree that such evidence, if presented, could have been somewhat beneficial to defendant on matters such as possession, defendant's claim is much too speculative. The decision not to call witnesses is a matter of trial strategy and may constitute ineffective assistance of counsel only if the defendant was deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant makes reference to an appendix attached to his brief, which is supposedly a letter from defendant to trial counsel requesting counsel to subpoena Biga. Defendant's appellate brief, however, has no such attachment. Regardless, for this claim to have any

[7] It is not clear what "written argument" defendant is referencing here. It may be arguments contained in the motion to remand filed in this Court or the brief on appeal.

potential merit, we would minimally expect an affidavit from Biga or some comparable documentary evidence reflecting what testimony would have been provided by Biga had he been called as a witness. Without any support, defendant's assertions with respect to what testimony Biga would have provided are purely speculative. Accordingly, defendant has failed to overcome the presumption that counsel's decision not to call Biga was a matter of sound trial strategy. Defendant has failed to show that he was deprived of a substantial defense and that he was prejudiced. We note, on the issue of prejudice and consistent with our earlier comments, that even had Biga testified as claimed by defendant, the jury could still have reasonably found defendant guilty because of the proximity of defendant's personal belongings to the cocaine and on the basis of a joint possession theory.

Next, defendant maintains that trial counsel failed to file a motion to exclude the introduction of prior bad acts, which, if filed, would have precluded the prosecutor from using evidence of past crimes, and which then would have permitted defendant to take the stand on his own behalf. Defendant contends that the prosecutor suggested that she would impeach defendant with his criminal record if he took the stand. He further argues that his prior convictions were inadmissible under MRE 609 (impeachment by evidence of conviction of crime) and MRE 404(b). This argument is also much too speculative on numerous levels and lacks sound reasoning.

The record indicates that defendant was convicted in 1981 of larceny from a building, in 1982 of attempted false pretenses, and in 1998 of delivery of a controlled substance. Because of the nature and age of the crimes, it would arguably appear that they would be inadmissible under MRE 404(b) and MRE 609. We first note that MRE 404(b) is irrelevant to defendant's argument as evidence of prior bad acts or crimes can be introduced by the prosecution regardless whether a defendant chooses to testify. Further, defendant fails to cite to the record in support of the proposition that the prosecutor threatened to introduce evidence of past crimes should defendant take the stand, and defendant makes no claim that trial counsel suggested to him that such evidence would be admissible if he took the stand. The trial court accepted testimony from defendant relative to him invoking his Fifth Amendment right not to testify. Defendant indicated that he understood that he had a right to testify but elected not to testify consistent with his constitutional rights. Defendant made no claim that he declined testifying because of concerns that his prior convictions could be used for impeachment.

An inherent flaw in defendant's argument is that trial counsel, even without filing a motion in limine before trial, could have sought the exclusion of prior convictions outside the presence of the jury at the time defendant took the stand, had he done so, and when, and if, the prosecutor showed an inclination to introduce the evidence on cross-examination. Once again, there is no indication that trial counsel informed defendant that past convictions could be used for impeachment if defendant took the stand, and there is no indication in the record that counsel would not have challenged any attempt by the prosecutor to admit impeachment evidence. If, as defendant claims, the evidence of past crimes was inadmissible, defendant need not have had any fear of such evidence upon taking the stand. Moreover, defendant's argument requires us to conclude that he would have actually chosen to take the stand had counsel moved to exclude any reference to past crimes and had the court granted the motion, and it requires us to conclude that his testimony would have changed the outcome of the trial. We cannot speculate in such a grand

style. Defendant has failed to show deficient performance on the part of counsel and has failed to establish prejudice.

Next, defendant argues that trial counsel failed to file an interlocutory appeal, challenging the trial court's denial of defendant's motion to dismiss for violation of the 180-day rule. Once again, we are faced with a hopelessly speculative and unsound argument. The denial of the motion could have been directly challenged in an appeal as of right, which defendant has not done, without resort to an application for leave to appeal at the time of the court's ruling, and this Court would have had no legal obligation or duty to grant the application. Trial counsel's performance cannot be deemed deficient. Moreover, there was no error by the trial court in denying the motion.

Defendant was taken into custody on the date the search warrant was executed, September 26, 2002. Defendant was in violation of his parole, and he remained in custody through the date of trial, which was held on June 24th and 25th of 2003. After his arrest, a complaint and felony warrant on the charges of drug possession and maintaining a drug house were not issued until March 7, 2003. A writ of habeas corpus, signed March 13, 2003, resulted in defendant being brought from the Michigan Department of Corrections, Thumb Correctional Facility, to court for purposes of arraignment and a preliminary examination. The arraignment was held on March 28, 2003, and the preliminary examination was conducted on April 10, 2003. Defendant complains that more than 180 days elapsed from the time of his arrest on September 26, 2002, until the time the warrant was issued in March 2003 and the time of trial in June 2003.[8] Defendant cites MCL 780.131(1) and MCR 6.004(D) in support of his position.

MCR 6.004(D) provides:

> (1) [T]he prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:
>
> (a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or
>
> (b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.

[8] We note that less than 180 days elapsed between September 26, 2002, and the date the warrant was issued, March 7, 2003. Defendant claims that the warrant was issued or executed on March 27, 2003, thus going beyond the 180-day period, yet we are unsure where defendant obtained this date as it is not reflected in the record. Ultimately, it does not affect our ruling.

> For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.[9]

Accordingly, the 180-day period did not commence, as claimed by defendant, on September 26, 2002, but rather in March 2003 when the complaint and warrant were issued and the prosecutor and the Department of Corrections had knowledge of the charges. Any time during which there is no charge pending is not a delay chargeable to either party. *People v Chavies*, 234 Mich App 274, 278; 593 NW2d 655 (1999). Trial was held well within 180 days of issuance of the complaint and warrant. The period of time defendant was imprisoned before issuance of the complaint and warrant can be attributed to his parole violation. Even assuming that defendant was charged, or should have been charged, soon after the commission of the crimes, the purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently, and this statutory goal does not apply in a case where a mandatory consecutive sentence is required upon conviction. *Id.* at 280. Under MCL 768.7a(2), consecutive sentencing is mandatory when someone commits a crime while on parole. *Chavies, supra.* Reversal is not warranted.

Defendant next contends that trial counsel failed to object to the enhancement of defendant's sentences, where they were improperly supplemented under the habitual-offender statutes and the controlled substances act. This argument lacks merit because there was no such duplicative enhancement; therefore, any objection would have been meritless and counsel was thus not deficient in failing to object. *People v Ish,* 252 Mich App 115, 118-119; 652 NW2d 257 (2002). The substance of this issue is discussed more thoroughly below as part of our discussion of multiple sentencing issues raised by defendant.

Regarding defendant's claims of ineffective assistance of appellate counsel that are raised in his standard 11 brief, they lack merit because, assuming deficient performance, defendant fails to show or relevantly explain with any substance how he was prejudiced. Defendant has not shown the existence of a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. There is, however, one exception to our ruling. The judgment of sentence can be read as requiring that the conviction for drug possession be served consecutive to the conviction for maintaining a drug house. While running these sentences consecutive to any sentence arising out of the parole violation was proper, we see no basis for running them consecutive to each other. The trial court did not make this ruling from the bench at sentencing. The case is remanded for clarification on the matter and for possible correction of the judgment of sentence if the court did not intend the sentences to run consecutively. Of course, the trial court must abide by the rule of law in Michigan that concurrent sentences are the

[9] MCL 780.131(1) contains a similar requirement. It provides, in pertinent part, that "[w]henever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate . . . a criminal offense . . ., the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney . . . written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint." *Id.*

norm and consecutive sentencing is not to be used except when specifically authorized by statute. *People v Henry*, 107 Mich App 632, 635; 309 NW2d 922 (1981).

D. Sentencing Issues

Defendant argues that the sentences are not proportionate to the seriousness of the offenses given the small amount of cocaine found in the apartment. He also maintains that he was improperly considered a fourth habitual offender, where there was a hiatus of greater than 10 years between the present convictions and two of his prior felony convictions. Defendant also argues that his sentences were improperly enhanced under both the habitual-offender statutes, specifically MCL 769.12, and the controlled substances act. Defendant's arguments are devoid of any merit.

The crimes occurred in September of 2002; therefore, the legislative sentencing guidelines are applicable. MCL 769.34(2). The record indicates that the minimum guidelines range for both offenses was 0 to 34 months, and defendant agrees. The minimum sentence issued by the trial court on both offenses was 18 months and thus within the minimum sentencing ranges. MCL 769.34(10) requires us to affirm a sentence within the minimum range absent an error in the scoring of the sentencing guidelines or reliance on inaccurate sentencing information. Defendant fails to rely on these exceptions, but rather argues that the sentences were disproportionate because of the small amount of drugs found at the scene. This is not a valid argument under MCL 769.34(10). As such, we are mandated to affirm the sentences as they were within the minimum guidelines ranges.

Defendant next argues that he was improperly considered a fourth habitual offender, where more than 10 years passed between the present convictions and two of his prior felony convictions. The prior felonies relied on by the prosecution included one 1998 felony conviction, eluded to by us earlier, and two felony convictions in the early 1980s. Defendant cites no authority for the proposition that felonies, which are 10 years old or older, may not be considered under the habitual-offender statutes. A review of MCL 769.12 reveals no such limiting language but merely speaks of prior felonies or attempts to commit felonies. There is no time-frame requirement. We note that MRE 609(c) contains a 10-year time limit; however, this rule of evidence pertains to impeachment by evidence of prior criminal convictions and not to the enhancement of sentences.

Finally, defendant argues that his sentences were improperly enhanced under both the habitual-offender statutes and the controlled substances act. There is no indication in the record that defendant's sentences were enhanced under the controlled substances act. Rather, all the documents in the lower court file reflect that defendant's sentences were enhanced under MCL 769.12 – fourth habitual offender. The cocaine possession conviction, without consideration of prior felonies, carried a maximum possible term of imprisonment of 4 years. MCL 333.7403(2)(a)(*v*). Because of defendant's three prior felony convictions, and in light of the fact that the drug possession conviction was punishable upon a first conviction for a term of less than 5 years, MCL 769.12(1)(b) permitted the court to sentence defendant to an enhanced maximum term of not more than 15 years. Defendant was sentenced to a maximum term of 15 years; there was no additional enhancement.

The conviction for maintaining a drug house was punishable as a misdemeanor, with a maximum term of imprisonment of not more than two years. MCL 333.7406. Thus, this crime is a high misdemeanor, yet it is considered a felony for purposes of the habitual-offender statutes because a felony is defined, under the Code of Criminal Procedure, as a "violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g); see also *People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985)(We "conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes."). Because of defendant's three prior felony convictions, and in light of the fact that the conviction for maintaining a drug house was punishable upon a first conviction for a term of less than 5 years, MCL 769.12(1)(b) permitted the court to sentence defendant to an enhanced maximum term of not more than 15 years. Defendant was sentenced to a maximum term of 15 years; there was no additional enhancement.

We note that MCL 769.12(1)(c) provides that, if a subsequent felony "is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461." However, possession of a controlled substance less than 25 grams and maintaining a drug house are not major controlled substance offenses as defined by MCL 761.2. See *People v Fetterley*, 229 Mich App 511, 526-528; 583 NW2d 199 (1998). Concomitantly, the current convictions do not implicate the enhancement provisions of the controlled substances act. MCL 333.7413. In conclusion, there is no record support whatsoever to conclude that the trial court enhanced defendant's sentence under the controlled substances act.

III. CONCLUSION

There was sufficient evidence presented at trial to support both convictions, and the guilty verdicts were not against the great weight of the evidence. Furthermore, the claims of ineffective assistance of trial and appellate counsel do not warrant reversal, except as to the claim related to the judgment of sentence and the language specifying that the current convictions must be served consecutive to each other. Finally, all other sentencing issues posed by defendant lack merit.

Affirmed with respect to all of the issues presented except as to the sentencing matter discussed above, which is remanded for possible correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell